INDEX

	Page
Petition	1
Opinion below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	2
Specification of errors to be urged	10
Reasons for granting the writ	11
I. The case presents a question of public importance which has not been, but should be decided by this Court	11
II. The decision of the Circuit Court of Appeals is in conflict with applicable decisions of this Court	17
(a) That competitors are free to follow the same illegal sales method is no defense	17
(b) Methods of competition which injuriously affect or tend to affect the business of competitors are against public policy	18
Dealers selling only "Straight Goods" cannot successfully compete with respondent and others selling "Break and Take" candy	18
III. The decision of the Circuit Court of Appeals is in conflict with the decisions of other Circuit Courts of Appeals	21
Appendix:	
(A) Relevant portions of Section 5 of the Federal Trade Commission Act	23
(B) State statutes prohibiting lotteries, gift enterprises, etc.	27
(C) Memorandum showing opposition of other industries to the use of the lottery-merchandising system	30
(D) Competitors and representatives of competitors who testified to the unfair and injurious effect upon their business of the method of sale used by respondent, and page references to the record	40

CITATIONS

Butterick Co. v. *Federal Trade Commission*, 4 F. (2d) 910, 912	21
Chamber of Commerce of Minneapolis v. *Federal Trade Commission*, 13 F. (2d) 673, 686	21

	Page
Farmers' Livestock Commission Co. v. *United States*, 54 F. (2d) 375, 379	21
Federal Trade Commission v. *Gratz*, 253 U.S. 421, 427	18, 19
Federal Trade Commission v. *Raladam Co.*, 283 U.S. 643, 648, 651	18
Federal Trade Commission v. *Winsted Hosiery Co.*, 258 U.S. 483, 493	17
Hills Bros. v. *Federal Trade Commission*, 9 F. (2d) 481, 485	21
Royal Baking Powder Co. v. *Federal Trade Commission*, 281 Fed. 744, 752	21

In the Supreme Court of the United States

OCTOBER TERM, 1933

No. —

FEDERAL TRADE COMMISSION, PETITIONER

v.

R. F. KEPPEL & BROTHER, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General and the Chief Counsel of the Federal Trade Commission, on behalf of the Commission, pray that a writ of certiorari issue to review the decree of the Circuit Court of Appeals for the Third Circuit, entered in this cause on January 25, 1933, which set aside the order of the Federal Trade Commission requiring the respondent, R. F. Keppel & Brother, Inc., to cease and desist from certain alleged unfair methods of competition.

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 371) is reported in 63 F. (2d) 81.

JURISDICTION

The decree of the Circuit Court of Appeals was entered January 25, 1933 (R. 383). The time for

filing a petition for certiorari was duly extended on April 22, 1933, by order of one of the Justices of this Court to June 21, 1933 (R. 385). The jurisdiction of this Court is invoked under Section 5 (Paragraphs 4 and 5) of the Federal Trade Commission Act (*infra,* p. 23) and under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the sale of merchandise in interstate commerce by a scheme or plan whereby it is not only merchandise but a gambling device as well, and which scheme or plan involves the sale of the merchandise not on the basis of quantity, quality, or price, and which further tends to restrain competition and injures competitors not using such a plan or scheme, is an unfair method of competition.

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act (Act of September 26, 1914), c. 311, 38 Stat. 717, 719, is set forth in Appendix A, *infra,* p. 23.

STATEMENT

The complaint issued by the Federal Trade Commission (R. 2–7) charged the respondent herein with the use of certain unfair methods of competition in commerce, in violation of Section 5 of the Federal Trade Commission Act. The respondent answered this complaint (R. 8–9), and, after the taking of testimony before one of its examiners

(R. 29–332, 347–367), the Commission entered its findings of facts and conclusion (R. 12–24), which resulted in an order against the respondent to cease and desist from the practices complained of. Upon a petition for review (R. 333–346), this order was set aside by a majority of the court below, one judge dissenting (R. 371–382).

The Commission found as a fact that respondent manufactures, sells, and distributes in interstate commerce, to wholesalers, jobbers, and retailers, certain assortments of candy, in competition with other corporations, firms, and partnerships similarly engaged (R. 13). Among the assortments is one labeled "Chocolate Penny Men 120s", containing 120 pieces of chocolate-covered creams moulded in the shape of a man, retailing for one cent each. Four of the pieces of candy conceal pennies, placed there by respondent at the time it manufactures and packs the assortment. The four purchasers procuring the pieces containing pennies receive their money back, thereby getting their pieces of candy free. The purchaser has no way of telling which pieces contain pennies (R. 13–14).

Another assortment, consisting of peanut bars, is called "1, 2, 3 Big Chief 60s." This candy is packed in boxes containing 60 pieces each, ten of which retail at one cent, ten at two cents, and forty at three cents. The pieces of candy are of uniform size and quality, and are wrapped in nontransparent paper. Enclosed within the wrapper of each piece is a ticket bearing the retail price at

which the piece of candy is to be sold—either one cent, two cents, or three cents. The purchaser cannot tell until after selecting his piece of candy and removing the wrapper the price he will have to pay for it (R. 14–15).

A third assortment is called "School Days 200s," containing 200 pieces of chocolate-covered creams of uniform size and shape, retailing at one cent each. Of these the centers of sixteen are pink, four are chocolate, and the remainder are white. Also included in the package are eight chocolate-covered pieces of candy moulded into the shape of a girl, eight moulded into the shape of a boy, four double pieces moulded to represent twins, and a "School Companion," containing five lead pencils, a pen and penholder, a six-inch ruler, and two erasers. The purchaser procuring a piece of candy having a pink center receives, in addition to the piece of candy, one of the chocolate boys or girls; if he procures a chocolate center he receives one of the twins; and if he purchases the last piece in the box he receives the "School Companion." There is no way by which the purchaser can tell the color of the center until after he has purchased the piece of candy and broken it open (R. 16–17).

Packed in each assortment mentioned above is a display card prepared by respondent for use by the retailer in selling the candy, explaining and describing the plan for selling the candy by lot or chance, in the manner hereinbefore described (R. 14, 15, 16, 18).

The Commission found that, under the sales plan employed in connection with the above assortments, lot or chance alone determined whether the purchaser from the retailer received his piece of candy free of charge, paid one, two, or three cents for it, or received a prize or premium of a larger piece of candy, or an article of merchandise.

It found, also, that lottery or prize packages are generally referred to in the candy trade as "Break and Take" packages, and assortments without these features as "Straight Goods" (R. 17); that retailers purchase respondent's "Break and Take" packages either directly from respondent or from jobbers and wholesalers who in turn have purchased them from respondent, and display the assortments, for resale to the public, as manufactured, packed, and suggested by the respondent, using the display cards furnished (R. 17, 18); that all sales made by the respondent, whether to jobbers, wholesalers, or retailers, are absolute sales; that the assortments are assembled and packed in such manner that they can be displayed by the retailer for sale and distribution to the public as suggested by the display card enclosed in each package, without alteration or rearrangement, and that unless the retailer unwraps, unpacks, disassembles, or rearranges the packages or assortments, they cannot be resold to the public except as a lottery or gaming device; and that the respondent not only has knowledge of the fact that the retailer sells these candy assortments by lot or chance, but packs and assembles the candy

with this purpose in view (R. 18). So far as the "Chocolate Penny Men" are concerned it is impossible to eliminate the gaming feature (the penny) inserted in four of the pieces in the assortment except by destruction of the pieces of candy (R. 14); and it is true also that respondent does more than pack and assemble the candy with knowledge of its disposition by lot or chance, for it is the respondent who originates and conceives the gaming device and prints the display cards (explaining the method of sale) which accompany each assortment (R. 14, 15, 16).

There is a finding also that the sale and distribution of respondent's candy by retailers as described is a sale by lot or chance and constitutes a lottery or gaming device; that many competitors regard respondent's method of sale and distribution as morally bad and encouraging gambling, especially among children; as injurious to the candy industry, because it results in the merchandising of a chance or lottery instead of candy; and as providing retail merchants with the means of violating the laws of the several States; that the effect on competitors selling "Straight Goods" is injurious and results in a diversion of trade from such competitors to respondent and others following similar practices, and the forcing of competitors to sell "Break and Take" goods in order to successfully compete with respondent and others employing the same methods, thereby acting as a restraint upon the freedom

of fair and legitimate competition in the candy industry (R. 18–19, 22); that the principal demand for the "Break and Take" candy comes from small retailers, who are often located near schools, and most of this candy is sold to children, who, because of the lottery or gaming feature connected with it, purchase it in preference to the "Straight Goods" candy when the two types are displayed side by side; that in many instances children purchase a piece of candy, break it open, and, if the center is not of a prize-winning color, throw it away and purchase other pieces until a prize is obtained or their money gone; and that the sale of "Break and Take" candy teaches and encourages gambling among children (R. 20).

There are in the United States a large number of candy manufacturers producing and selling "Break and Take" candy of a character similar to that produced by respondent, and all of this "Break and Take" candy is in direct competition with "Straight Goods" of the same price level (R. 20–21). The pieces of candy in the "Break and Take" packages of all manufacturers of this type of candy are either smaller in size or inferior in quality to corresponding pieces of "Straight Goods"; and these differences in quantity or quality are necessary in order to compensate for the value of the prizes or premiums distributed with the "Break and Take" goods (R. 21–22). Children purchase the "Break and Take" candy

180854—33——2

in preference to the "Straight Goods" because of the chance of winning a prize or premium (R. 22).

Respondent itself sold "Break and Take" candy prior to 1925. In that year it discontinued the sale of this type of candy and manufactured and sold "Straight Goods" for a time, but during this period its business showed a decided decrease in volume and profits. Thereafter, it resumed the sale of "Break and Take" candies, with the result that its sales have shown a continuously increased volume, and at the time the findings of the Commission were made 60 percent of the respondent's sales consisted of candy with a lottery or gaming feature. During the time respondent was not manufacturing and selling "Break and Take" candy, many of its competitors were doing so, and, in order to meet this competition, respondent considered it necessary to resume the manufacture and sale of "Break and Take" goods (R. 22–23). Respondent's entire manufacturing business for the year ending June 30, 1930, amounted to approximately $391,000 (R. 23).

The Commission found that the sale and distribution of candy by lot or chance is against the public policy of many of the States, and that some of these States have laws making lotteries and gaming devices penal offences (R. 23).

Upon the basis of its findings of fact the Commission concluded that the respondent's practices

were to the prejudice of its competitors and the public and constituted unfair methods of competition in commerce in violation of Section 5 of the Federal Trade Commission Act (R. 24).

The order entered by the Commission required the respondent to cease and desist from selling and distributing to jobbers and wholesale dealers, for resale to retailers, packages or assortments of candy so packed and assembled that they can be used as a lottery, gaming device, or gift enterprise, in the resale of the candy to the public, and from furnishing in such assortments of candy, or separately, display cards which explain to the purchaser the lottery method of sale (R. 25–28).

The court below, one judge dissenting (R. 376), without disturbing the Commission's findings or holding that they were not supported by adequate evidence,[1] set aside the order on the ground that the Commission was without jurisdiction to enter it. The basis of its decision was: (1) that respondent had done nothing against public policy because its acts could not, of themeslves, tend to hinder competition or create monopoly, since its competitors "were free to use the same sales methods * * * and to obtain their share of the penny candy trade on an equal footing"; (2) that there was nothing in the case to show deception, fraud, or bad faith affecting competitors or the ultimate consumer.

[1] We, therefore, do not deem it necessary for present purposes to recite the evidence before the Commission.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

(1) In holding that respondent's practices do not tend to hinder competition.

(2) In holding that respondent's competitors were not injured because they could use the same sales methods.

(3) In holding that a sales plan in which the traders employing it do not compete on the basis of quality, quantity or price, but which introduces a lottery or gaming device to enable them to sell their goods, is not an unfair method of competition.

(4) In holding that a sales plan which induces a consumer to purchase an article smaller in size or inferior in quality to similar competing articles because of a chance to win a prize or premium, without advising the purchaser that the article is smaller in size or inferior in quality, is not a deceptive plan, and therefore an unfair method of competition.

(5) In holding that a sales plan which provides retailers with a means by which they violate the lottery laws of their respective States, and which forces competitors, in order to compete on even terms, to become originators of devices and participants in plans whereby State laws are violated, is not an unfair method of competition.

(6) In disregarding that portion of Section 5 of the Federal Trade Commission Act which provides that "The findings of the Commission as to the facts, if supported by testimony, shall be con-

clusive", when the findings in this case specifically show that the sales plan of respondent involved in this proceeding is injurious to competitors and the purchasing public, and such findings are amply supported by adequate testimony.

(7) In holding that, upon the findings of fact and conclusion of the Commission, the cease and desist order entered was not within the jurisdiction of the Federal Trade Commission.

(8) In setting asfde the cease and desist order of the Federal Trade Commission.

REASONS FOR GRANTING THE WRIT

I

THE CASE PRESENTS A QUESTION OF PUBLIC IMPORTANCE WHICH HAS NOT BEEN, BUT SHOULD BE DECIDED BY THIS COURT

(a) The holding of the Circuit Court of Appeals means that competition in trade need no longer be based on the quantity, quality, or price of the article sold, but upon the manufacturing and packing of the merchandise in such manner that it is not only merchandise but also a gambling device, which, when used in retail sales, appears to be illegal under the laws of all of the States. (See Appendix B, *infra,* p. 27.) This device not only results in the merchandising of something other than articles of commerce—in this case a chance—but injures the business of those manufacturers who for ethical as well as legal reasons refuse to be a party to similar plans, thereby hindering competition.

(b) This case involves one of the largest industries in this country, its total sales amounting to hundreds of millions of dollars. In the years 1929 and 1931, the total volume of business of the confectionery industry in the United States (including confectionery made as secondary products in other industries) was as follows: [2]

1929 (sales by manufacturers)	$368,628,691
1931 (production by manufacturers)	264,144,549

An estimate of total sales of candy for the years 1930 and 1931, is as follows: [3]

1930	$318,558,306
1931	269,450,859

There are two general methods of selling candy by gambling schemes: (1) the various types of "Break and Take" packages similar to those used by respondent herein; and (2) punch boards, fortune boards, push cards, etc., which are not only used to sell candy, but also many other kinds of merchandise. While these last named devices are not directly involved in this case, their use is spreading rapidly, and the right of manufacturers to sell merchandise in that fashion will undoubtedly be affected, if not controlled, by the decision in this case. The Commission has issued complaints against a number of respondents using them to sell all kinds of merchandise, including candy, and has

[2] Census of Manufacturers, 1931, Bureau of the Census, Department of Commerce, "Confectionery."

[3] Confectionery Distribution in the United States, 1930–1931, Department of Commerce, Bureau of Foreign and Domestic Commerce, Foodstuffs Division.

issued an order to cease and desist against one respondent.

The "Break and Take" schemes are used in selling what is known in the candy industry as "penny goods," which consist of candy sold generally for 1, 2, and 3 cents per piece, and "bars" selling for 5 and 10 cents each. To a lesser extent, boxed candy is sold by this means, usually in the form of prizes or premiums. The figures of the Bureau of Foreign and Domestic Commerce show that in 1930 and 1931, the sales of penny goods and bars of various kinds amounted to $104,604,251 and $87,642,958, respectively. While all of this candy is not sold by means of lottery packages, it is probable that at least 50 percent is, which would amount to a total of $52,332,125 in 1930, and $43,821,478 in 1931, of "penny goods" and "bars" sold by the methods complained of by the Commission.

Cases coming before the Commission, in which complaints have been issued, indicate the widespread use of lottery schemes and punch boards by candy manufacturers. It should be noted also that there are many candy manufacturers who are not members of the national association of the candy manufacturers and undoubtedly some of them use these methods of sale. The cases before the Commission show that a large volume of boxed or packaged candy is sold by means of punch boards and

similar devices. According to the figures of the Bureau of Foreign and Domestic Commerce the total sales of boxed candy were, in 1930, $57,310,411, and in 1931, $51,240,677.

The figures above set forth indicate the importance of this industry and the extent to which gambling schemes and devices of various kinds have been used in it to sell its products.

(c) The practice of selling merchandise, not upon its merits but as part of a gaming scheme, has become increasingly prevalent in recent years. In findings of facts made by the Commission in Docket No. 1862, A. S. Douglis & Company et al., in which an order to cease and desist has been entered but not yet presented to the courts for review, the Commission found that through the use of punch boards and similar devices respondents have sold merchandise consisting of jewelry, knives, candy, tableware, clocks, dishes, traveling bags, blankets, fountain pens, automatic pencils, flashlights, cigarette cases, pipes, sporting goods, fishing tackle, cameras, doll babies and various other small articles.

Many industries have taken action against the introduction and spread of this method in their lines by means of resolutions adopted in conventions, or in codes of ethics governing fair practices in the particular industry. A reference to a few of the industries will be made here, and more detailed statements regarding the action taken may be

found in Appendix C, *infra*, p. 29. Thus, in 1923, the National Confectioners' Association adopted resolutions against the practice, as did the New England Confectioners' Association. In 1924 the New England Association again adopted resolutions condemning the method, and the Association of Manufacturers of Confectionery and Chocolate of the State of New York took active steps to suppress the method of sale in its territory. The Report of the National Industrial Conference Board, 1929, on the Public Regulation of Competitive Practices, approved the action of the Commission in holding such sales methods to be unfair methods of competition. The Grocery Industry in 1928 (with net sales for 1929 aggregating $10,837,421,585) adopted a resolution in its Trade Practice Conference before the Commission condemning lottery sales schemes as unfair trade practices. The Trade Practice Conference for the Petroleum and Petroleum Products Industry (with products for 1929 estimated to be of the value of $2,639,700,000), held by the Commission in 1929, adopted a resolution condemning lottery schemes and games of chance in connection with sales, as did the Association of Ice Cream Supply Men, in 1920, and the National Association of Ice Cream Manufacturers in 1922. The International Association of Milk Dealers in 1923 declared lottery schemes to be unfair. And in the code of ethics adopted by the

National Confectioners' Association in 1923, punch boards and other lottery devices were held to be injurious and detrimental to the best interests of the industry.

(d) The present case was chosen by the Commission as a test case, the final decision of which will govern the disposition of other pending cases. The Commission has issued 64 complaints against other candy manufacturers, charging them with using similar methods of sale. The testimony shows that 15% of the membership of the National Candy Manufacturers' Association are not employing lottery or gaming devices as an aid in selling their candy (R. 324). There are also many manufacturers, not members of the Association, who do not use such a sales plan. These two groups represent a substantial percentage of the candy manufacturers of the country, and are entitled to protection against unfair methods. While it is true that practices similar to respondent's are becoming increasingly prevalent, and are encouraging violation of State laws among manufacturers and retailers, there is, however, a strong indication in the evidence that a substantial portion of the candy manufacturers employing lottery or gaming devices would prefer to abandon the practice were it not for the fact that they fear they would lose business to competitors not abandoning it.

II

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT

(a) *That competitors are free to follow the same illegal sales method is no defense*

The holding of the court below that "other candy manufacturers were free to use the same sales methods as those of the petitioner and to obtain their share of the penny candy trade on an equal footing with the petitioner" is directly contrary to the decision in *Federal Trade Commission* v. *Winsted Hosiery Co.*, 258 U.S. 483, 493, in which this Court said:

> That these honest manufacturers might protect their trade by also resorting to deceptive labels is no defense to this proceeding brought against the Winsted Co. in the public interest.

The testimony in the instant case shows that 15 percent of the 450 members of the National Candy Manufacturers' Association do not employ sales methods such as used by respondent (R. 324), and there are many other manufacturers, not members of the Association, who do not use them. All of these manufacturers are competitors of respondent, and they are entitled to protection against the sales method resorted to by the respondent and others following the same plan. In order to compete successfully with respondent, these manufac-

turers are forced to manufacture and sell in interstate commerce merchandise which is not only merchandise, but a gambling device as well, which, when used in retail sales, violates State laws.

The decision of the lower court is also in conflict with that portion of the decision in the *Winsted Hosiery case* (*supra*) holding that (pp. 493–494):

> The fact that misrepresentation and misdescription have become so common in the knit underwear trade that most dealers no longer accept labels at their face value does not prevent their use being an unfair method of competition. A method inherently unfair does not cease to be so because those competed against have become aware of the wrongful practice. Nor does it cease to be unfair because the falsity of the manufacturer's representation has become so well known to the trade that dealers, as distinguished from consumers, are no longer deceived.

(*b*) ***Methods of competition which injuriously affect or tend to affect the business of competitors are against public policy***

The decision of the Circuit Court of Appeals is also in conflict with the decisions of this Court to this effect in *Federal Trade Commission* v. *Gratz*, 253 U.S. 421, 427, and *Federal Trade Commission* v. *Raladam Co.*, 283 U.S. 643, 648, 649, 651.

Dealers selling only "Straight Goods" cannot successfully compete with respondent and others selling "Break and Take" candy.—It is not neces-

sary in the instant case to rely upon a "dangerous *tendency* unduly to hinder competition or create monopoly" (*Federal Trade Commission* v. *Gratz*, 253 U.S. 421, 427, *supra*), because the undisputed facts already recited demonstrate that the business of many "Straight Goods" manufacturers have been seriously injured by the sales plan followed by respondent. There are findings to this effect (R. 19, 22–23), and the court below, in its opinion, also recognizes this fact.

From the testimony it appears that when penny and nickel "chance candies" are on sale with "Straight Goods," children almost invariably select those involving a gamble (R. 68, 91, 94, 101, 103, 110, 116, 126, 130, 131, 169, 179, 222, 244, 278, 307, 327). The result is that "Straight Goods" rarely sell over the same counter with "chance candies." So established is this observation that many keepers of small stores have ceased to buy and display "Straight Goods" for the penny trade. They sell only "chance candies." In consequence, more than half of the manufacturers of penny candies in this country have gone into the "trick trade" (R. 324). Many traveling salesmen for "Straight Goods" houses have complained of their inability to sell their wares in competition with "chance candies." Others have refused to continue the effort and have threatened to seek employment elsewhere (R. 164, 206, 219–220, 235–236, 262–264, 279–280). One "Straight Goods" concern at-

tributes to competition by "chance candies" a drop in its business of 50% in the sale of penny goods and 20% in the sale of nickel goods (R. 277). A concern manufacturing only "Straight Goods" lost some of its strong customers because, wanting "chance candies" as well, they preferred to buy both kinds at one place (R. 283). Still another manufacturer who handled "Straight Goods" alone saw his business reduced 85% by reason of this new type of competition (R. 305–306). Two manufacturers, "competing * * * for that child's penny," declared that their refusal thus far to put a gamble in their candy packages has placed them at a distinct disadvantage (R, 310–311, 315). Another concern was "forced" to meet the respondent's competition by putting out trick candy packages. It then discontinued the practice, but later was forced to resume it, mainly because "a howl was set up by our salesmen that they could not get the business." Again it stopped the practice and again it was forced to resume it in order not only to regain business in "chance candies," but to retain its business in "Straight Goods," as customers who still deal in candies of both kinds want to buy all their requirements from one manufacturer or jobber. When it stopped selling "chance candies" its business fell off from 40 to 50%. When it started again, its business increased at once (R. 126–127, 133–134, 144, 174). Officers and salesmen of other companies testified to similar experiences, which apparently extend throughout the trade (R.

234, 256, 261, 269, 313, 328). These matters are all set forth in the dissenting opinion. A list of competitors who testified to the injurious effect upon their business of the method of sale used by respondent, with citations to the portions of the record where their testimony will be found appears in Appendix D, p. 39, *infra*.

III

THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUIT COURTS OF APPEALS

The decision of the court below is in conflict with the following decisions of various Circuit Courts of Appeals which hold that, in cases prosecuted under Section 5 of the Federal Trade Commission Act, it is no defense to prove that respondent's competitors have practiced the same illegal sales method: Second Circuit, *Royal Baking Powder Co.* v. *Federal Trade Commission,* 281 Fed. 744, 752; *Butterick Co.* v. *Federal Trade Commission,* 4 F. (2d) 910, 912; Eighth Circuit, *Chamber of Commerce of Minneapolis* v. *Federal Trade Commission,* 13 F. (2d) 673, 686; Ninth Circuit, *Hills Bros.* v. *Federal Trade Commission,* 9 F. (2d) 481, 485. In this connection, see also the decision in *Farmers' Livestock Commission Co.* v. *United States,* 54 F. (2d) 375, 379.

It is obvious that the decision of the court below that a cease and desist order is invalid which is directed against an unfair method of competition

that is contrary to public policy and is against good morals, and which excludes or strongly tends to exclude from the market all competitors who do not use the same method, upon the ground that respondent's competitors may protect themselves by adopting the same practices, seriously impairs the efficiency of Section 5 of the Federal Trade Commission Act.

Wherefore, it is respectfully submitted that this petition for writ of certiorari should be granted.

J. CRAWFORD BIGGS,
Solicitor General.

ROBERT E. HEALY,
Chief Counsel,
Federal Trade Commission.

JUNE 1933.

APPENDIX A

Relevant Portions of Section 5 of the Federal Trade Commission Act (Act of September 26, 1914, c. 311, 38 Stat. 717, 719)

That unfair methods of competition in commerce are hereby declared unlawful.

The commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the Acts to regulate commerce, from using unfair methods of competition in commerce.

Whenever the commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition in commerce, and if it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause

shown may be allowed by the commission to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the commission. If upon such hearing the commission shall be of the opinion that the method of competition in question is prohibited by this Act, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition. Until a transcript of the record in such hearing shall have been filed in a circuit court of appeals of the United States, as hereinafter provided, the commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section.

If such person, partnership, or corporation fails or neglects to obey such order of the commission while the same is in effect, the commission may apply to the circuit court of appeals of the United States, within any circuit where the method of competition in question was used or where such person, partnership, or corporation resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the commission. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person, partnership, or corporation and thereupon shall have

jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the commission. *The findings of the commission as to the facts, if supported by testimony, shall be conclusive.* If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commission, the court may order such additional evidence to be taken before the commission, and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings which, if supported by testimony, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari as provided in section two hundred and forty of the Judicial Code.

Any party required by such order of the commission to cease and desist from using such method of competition may obtain a review of such order in said circuit court of appeals by filing in the court a written petition praying that the order of the commission be set aside. A copy of such peti-

tion shall be forthwith served upon the commission, and thereupon the commission forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the commission as in the case of an application by the commission for the enforcement of its order, and *the findings of the commission as to the facts, if supported by testimony, shall in like manner be conclusive.*

The jurisdiction of the circuit court of appeals of the United States to enforce, set aside, or modify orders of the commission shall be exclusive. * * * (Italics ours.)

APPENDIX B

State Statutes Prohibiting Lotteries, Gift Enterprises, Etc.

Alabama: Sec. 4247, Code of 1928; Sec. 4248, Code of 1928.

Arizona: Sec. 4676, Revised Code of 1928.

Arkansas: Sec. 2667, Statutes of Arkansas (1921).

California: Chapter IX, Secs. 319 and 320, Penal Code.

Colorado: Chapter LXI, Sec. 3759, Compiled Laws (1921).

Connecticut: Secs. 6334 & 6338, Gen. Statutes, Revision of 1930.

Delaware: Sec. 3566, Revised Code, 1915.

District of Col.: Secs. 151–152, 313–314–315, D.C. Code (1929).

Florida: Vol. 4, Sec. 7667, Comp. Gen. Laws, 1927.

Georgia: Secs. 397 & 398, Penal Code (1926).

Idaho: Chap. 24, Secs. 17–2401 & 17–2403, Idaho Code Annotated, 1932.

Illinois: Chap. 38, Sec. 401, Criminal Code, 1931.

Indiana: Sec. 2680, Indiana Statutes, Revision of 1926.

Iowa: Chap. 593, Sec. 13218, Code of Iowa, 1931.

Kansas: Secs. 21–1504 & 21–1506, Revised Statutes, 1923.

Kentucky: Chap. 82, Sec. 2573, Kentucky Statutes, 1930.

Louisiana: Act 169 of 1894, p. 207, Sec. 1, Statutes of Louisiana, 1930, also Criminal Statutes, Annotated, 1932.

Maine: Chap. 136, Sec. 18, Rev. Statutes, 1930.

Maryland: Art. 27, Secs. 336–337–349, Ann. Code, 1924.

Massachusetts: Chap. 271, Sec. 7, Gen. Laws, 1932.

Michigan: Chap. 277, Secs. 16, 613, Comp. Laws, 1929.

Minnesota: Sec. 10209, Minn. Statutes, 1927.

Mississippi: Chap. 20, Sec. 1038, Miss. Code, 1930.

Missouri: Sec. 4315 Rev. Statutes (1929).

Montana: Chap. 32, Secs. 11149, 11150, Penal Code, 1921.

Nebraska: Chap. 28, Art. 9, Sec. 28–962, Comp. Stat. (1929).

Nevada: Sec. 10176, Compiled Laws, 1929.

New Hampshire: Chap. 384, Secs. 1 & 5.

New Jersey: Vol. 2, p. 1764, Comp. Statutes.

New Mexico: Chap. 1760, Sec. 310, N.M. Statutes.

New York: Secs. 1370–1371, Consolidated Laws.

North Carolina: Sec. 4428, N.C. Code (1927).

North Dakota: Arts. 9660–9661, Penal Code.

Ohio: Sec. 13064, Code of Ohio.

Oklahoma: Secs. 1893–1894, Comp. Statutes.

Oregon: Sec. 2116, Oregon Laws.

Pennsylvania: Secs. 7932–7933, Pa. Statutes.

Rhode Island: Chap. 401, Sec. 1, Gen. Laws.

South Carolina: Chap. XI, Sec. 199, Code of Laws.

South Dakota: Secs. 3894–3895, Comp. Laws (1929).

Tennessee: Sec. 6834, Ann. Code.
Texas: Art. 654, Penal Code.
Utah: Secs. 4253–4254, Penal Code.
Vermont: Chap. 310, Secs. 7078, 7079, Gen. Laws.
Virginia: Sec. 4693, Va. Code.
Washington: Sec. 2464, Comp. Stat.
West Virginia: Chap. 151, Art. II, W.Va. Code (1923).
Wisconsin: Sec. 34801, Wisc. Statutes.
Wyoming: Art. 7265, Comp. Statutes.

APPENDIX C

MEMORANDUM SHOWING OPPOSITION IN VARIOUS INDUSTRIES TO THE USE OF THE LOTTERY MERCHANDISING SYSTEM

Resolutions of Associations.—The National Confectioners' Association adopted resolutions condemning the sale of candy by gambling devices at a convention held in Atlantic City on May 25, 1923. The Commission does not have a copy of these resolutions, but a statement of their contents is contained in the resolutions of the New England Manufacturing Confectioners' Association, set forth below.

The New England Manufacturing Confectioners' Association, with offices at 40 Court Street, Boston, Mass., adopted the following resolutions at a meeting held on May 8, 1923:

> The matter of packing candy to be used for gambling, especially for children, was discussed very thoroughly. As a result the following resolutions were approved and the Secretary was instructed to forward the same to the Resolutions Committee of the National Association to be considered at the next convention:
>
> WHEREAS manufacturing confectioners in various sections of the country are making and selling candy and chewing gum packed and prepared in such form as to be available for and intended to be used as instruments of gaming, and

WHEREAS a large proportion of the candy and chewing gum so packed and prepared is sold by retailers to children who are thereby encouraged and induced to develop the gambling spirit: Therefore be it

Resolved, That the National Confectioners' Association in convention assembled condemns the manufacture and sale of candy and chewing gum so packed and prepared as to be manifestly designed for gambling purposes; and be it further

Resolved, That it is the sense of this Association that such preparation and sale is unethical, unfair in practice, and tends to lower the moral tone of the industry; and be it further

Resolved, That the Executive Committee direct the Secretary to communicate with such members of this Association as are selling such packages, requesting them to discontinue the practice, and if such request is not complied with to report their names to the Executive Committee for such action as may be deemed to be for the best interests of the industry and the welfare of the Association.

At another meeting held the next year, April 24, 1924, the following resolutions were adopted:

Resolved, That the New England Manufacturing Confectioners' Association goes on record as being opposed to the practice of making and selling candy and chewing gum put up in such form that the element of chance is the controlling factor in the sale of the merchandise. That this Association is in hearty accord with and fully appreciates the service rendered by the Association of Manufacturers of Confectionery and Choco-

late of the State of New York in its effort to suppress this growing evil in the confectionery industry.

The above resolutions were to be sent to the President of the New York State Association, and the following resolutions to be sent to the Resolutions Committee of the National Confectioners' Association:

WHEREAS The National Confectioners' Association at its annual convention in Atlantic City, May 25, 1923, approved and adopted a preamble and resolutions setting forth that the sale of candy and chewing gum packed and prepared in such form as to be available for and intended to be used as instruments of gambling was unethical, unfair in practice, and tended to lower the moral tone of the industry; and

WHEREAS The Association has adopted and published a Code of Business Ethics for the Candy Industry condemning the sale of confectionery wherein the element of chance is the controlling factor in its sale to consumers; and

WHEREAS, Manufacturing confectioners in various sections of the country are still engaged in the business and practice of making and selling candy packed and prepared in the manner herein referred to, therefore be it

Resolved, That this Association reaffirms its attitude as indicated by the adoption of the resolutions relating to this subject one year ago, and be it further

Resolved, That the Executive Committee be requested to formulate a plan for securing Federal legislation to put an end to the practices herein mentioned, and be it further

Resolved, That it is the sense of this Association that a campaign of publicity by means of the newspapers throughout the

> United States concerning the wide-spread evil of making and selling candy and chewing gum packed in such form as to be intended for gaming, be at once undertaken and that the Secretary be empowered and instructed to institute the same.

The above resolutions refer to activities on the part of the Association of Manufacturers of Confectionery and Chocolate of the State of New York to stop gambling schemes in the candy industry. It is apparent from these several resolutions of different confectioners' associations that the candy industry realizes the serious effect the sale of candy by lottery and gambling schemes is having, and that the industry is doing all in its power to stop it.

The National Association at its meeting in May 1923, at which resolutions were adopted, also adopted a Code of Ethics for the industry which contained a condemnation of the sale of candy by chance schemes.

Report of the National Industrial Conference Board, 1929, on the Public Regulation of Competitive Practices

This work discusses a number of sales methods, including "Lotteries." With reference thereto, it says:

> It is regarded as contrary to sound morality that men should be encouraged to seek "something for nothing"—or for a trifle. At the same time it is recognized that there are economic objections to a scheme which extracts small contributions from many, without compensation, for the benefit of the chance recipient of an unearned prize * * *.
>
> The policy adopted by the Commission [Federal Trade Commission] in these cases comports with established public policy.

> There was no finding that the prizes were misrepresented, that their drawing was dishonestly conducted, or that the quality of the coffee sold by the lottery method was inferior. * * * In other words, *an honest lottery as a method of promoting sales was held to constitute an unfair method of competition. This appears to be sound doctrine. If it is unfair competition to tempt buyers by misrepresentations of the quality of goods, it may be regarded as likewise unfair to tempt them to buy goods not upon their merits, but upon the chance of securing something for nothing.* (Italics ours.) (Pp. 149–151.)

Trade Practice Conference for the Grocery Industry, held under the auspices of the Federal Trade Commission on October 24, 1928

Briefly, a Trade Practice Conference is a *voluntary* proceeding duly authorized by the Federal Trade Commission whereby an industry may assemble for the purpose of discussing unfair methods of competition with a view to eliminating such methods.

At this conference involving the Grocery Industry over 700 persons were in attendance. Eighty-five percent of the brokers, 85% of the wholesale grocers, and 80% of the retail grocers were represented through associations or in person. In addition, numerous specialty manufacturers were represented.

One of the resolutions *adopted by the Conference,* and approved by the Commission, was Rule 3 of Group I, viz:

> The offering or giving of prizes, premiums, or gifts in connection with the sale of grocery products, or as an inducement

thereto, *by any scheme which involves lottery, misrepresentation or fraud, is an unfair trade practice.* (Italics ours.)

The significance of the position taken by the representatives of this industry will readily be apparent by reference to statistics published by the Bureau of the Census of the United States Department of Commerce. Thus, the publication "*Retail* Distribution—Summary for the United States—Fifteenth Census of the United States, 1930", at page 45, gives a grand total for net sales (1929), for the entire food group, of $10,837,421,585. While this figure includes confectionery stores, it does not include general stores which sell groceries with dry goods, apparel, and general merchandise, net sales for which is $2,570,744,006. The above figures cover the *retail* distribution. The publication "*Wholesale* Distribution—Summary for the United States—Fifteenth Census of the United States, 1930", at page 69, lists net *wholesale* sales for groceries and food specialties at $9,537,322,597.

The position taken by the Grocery Industry at the Trade Practice Conference (*supra*) is in line with previous declarations of both the retail and wholesale grocers association, which follow:

Extract from Declaration of Principles, adopted June 1923, by the National Association of Retail Grocers

Under the caption "Trading Stamps and Gift Schemes Deceptive", appears the following:

> We believe gift schemes, trading stamps and coupons of all kinds are detrimental to good merchandising and deceptive to the public.

Excerpt from "The National's Creed"—National Wholesale Grocers Association

> *Seventh.*—To have business conducted upon lawful and proper lines and to correct evils, including "schemes", "deals", *"Lotteries"*, premiums", and the subsidizing of jobbers' salesmen. (Italics ours.)

Trade Practice Conference for the Petroleum and Petroleum Products Industry, held under the auspices of the Federal Trade Commission, February 11, 1929

At this conference, between 95% and 97% of the refining industry of the United States was present or represented.

One of the resolutions adopted by this conference was Rule 5 of Group I, providing as follows:

> Lotteries, prizes, wheels of fortune, and/or other games of chance, shall not be used in connection with the sales of gasoline or motor oils.

This is also one of the largest industries. The "Commerce Yearbook, 1932", at page 49, lists the value of products for petroleum refining for 1929 at $2,639,700,000.

"The Fair Practices Code" of the Association of Ice Cream Supply Men, adopted at Atlantic City, September 20, 1920

This is another instance which shows that as early as 1920 lottery methods in the sale of goods had been condemned. A pertinent excerpt follows:

> The Code of the Association declares the following practices by its member firms unfair, and proof of their commission grounds for expulsion and for full publicity:

SECTION I

UNFAIR PRACTICES OF SELLER AS AGAINST BUYER

* * * * *

9. "Lottery" premiums—i.e., giving or offering premiums of unequal value, *the receipt of any particular premium to be determined by lot or chance.* (Italics ours.)

The "Census of Manufacturers, 1931—Summary by Industries, December 30, 1932", at page 9, lists the value of ice cream products at $267,507,751.

Extract from Code of Ethics of National Association of Ice Cream Manufacturers, adopted October 18, 1922

Under the caption "Unfair Practices of Seller against Buyer" appears the following:

10. Lottery premiums given or offering premiums of unequal value, *the receipt of any particular premium to be determined by lot or chance.* (Italics ours.)

Code of Ethics of the International Association of Milk Dealers, adopted at Sixteenth Annual Convention, held at Syracuse, N.Y., October 9, 1923

This Code lists certain trade practices which "are to be known and declared unfair." Among them are a number of practices between dealer and customer, No. 6 of which is:

(6) Lottery Premiums: Giving or offering premiums for consideration of merchandise or money, *the premiums to be determined by lottery.* (Italics ours.)

From "*Retail* Distribution—Summary for the United States—Fifteenth Census of the United States—1930", at page 45, it appears that the net

retail sales for 1929 of milk dealers amounted to $560,995,747. From the corresponding publication showing "*Wholesale* Distribution", at page 72, the net sales of dairy products is given as $601,424,379.

Extract from the Code of Ethics for the Candy Industry, adopted by the National Confectioners' Association of the United States in May 1923

Under the heading: "Practices Detrimental to the Reputation of the Industry", appears the following:

> Punch Boards, Raffle Cards, *and similar devices,* and *Candy sold in such manner as to be obviously intended for games of chance wherein the element of chance is the controlling factor in the sale of the Candy to the consumers,* which encourage and develop the gambling habit in children, are injurious to their morals and are detrimental to the best interests of the Candy Industry and are a menace to the future development of the Industry.
>
> We condemn the sale of such packages and ask the earnest, active cooperation of our members and all others engaged in the Candy Industry in bringing about the elimination of this evil from our Industry.
>
> The sale of such packages shall be considered to be prejudicial to the character and best interests of the National Confectioners' Association and the Candy Industry at Large, for which a member may be suspended or expelled from membership in the National Confectioners' Association. (Italics ours.)

Doubtless the above examples could be multiplied upon further investigation. It should, of course,

be remembered that the practice of disposing of commodities by lottery methods is more readily applicable to some lines of industry than others, i.e., to those involving the sale of goods in comparatively small packages or amounts, rather than bulky products. The candy and grocery trades are good examples.

APPENDIX D

COMPETITORS AND REPRESENTATIVES OF COMPETITORS WHO TESTIFIED TO THE UNFAIR AND INJURIOUS EFFECT UPON THEIR BUSINESS OF THE METHOD OF SALE USED BY RESPONDENT, AND PAGE REFERENCES TO THE RECORD

	Page
P. M. Smith, Pres., Allen & Smith Co., Inc., Richmond, Va	89–106
John Voneiff, Pres., Voneiff-Drayer Co., Baltimore, Md	120–162
John A. Wintz, Salesman for several candy manufacturers, Baltimore, Md	162–170
J. O. Huber, Candy broker for several manufacturers, Baltimore, Md	171–194
A. E. Sander, Pres., York Carámel Co., York, Pa	200–210
Bernard J. Schmidt, Candy salesman, Vonieff-Drayer Co., Baltimore, Md	210–217
Thomas H. Barnes, Candy salesman, Voneiff-Drayer Co., Baltimore, Md	217–227
John W. Trauger, Gen. Mgr., The Fair Play Caramels Corp., Johnson City, N.Y	228–238
Marston Abercrombie, Asst. Sales Mgr., Henry Heide, Inc., New York, N.Y	238–258
Daniel D. Sanford, Pres., National Licorice Co., Brooklyn, N.Y	258–273
Frank D. Close, Pres., George Close Co., Cambridge, Mass	274–303
Alton L. Miller, Treas. & Gen. Mgr., Chas. N. Miller Co., Boston, Mass	303–311
Harry R. Chapman, Gen. Sales Mgr., New England Confectionery Co., Cambridge, Mass	311–327
Leonard H. Hicks, Confectionery jobber, Boston, Mass	327–331

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